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**THESIS**

**POLICY AND THE LEGISLATIVE DRAFTER: THE CASE IN GHANA**

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## **Dedication**

This dissertation is dedicated to my family. Thank you for your love, prayers and support.

## CHAPTER 1: INTRODUCTION

### 1.1. Introduction of topic

The legislative drafter's role has largely been described by many authors as the transformation of government policy into law. Crabbe describes parliamentary counsel's prime function as transforming government policy into law.<sup>1</sup> Elliot states that legislative counsel's role is to prepare draft legislation that will meet the requirements of the policy to be implemented by legislation.<sup>2</sup> Goldsmith notes that a Bill is first and foremost the legal expression of a policy developed within a particular Government department and that the Office of Parliamentary Counsel translates that policy into a legal text.<sup>3</sup> Turnbull states that the drafter's primary objective is to give exact effect to the instructing department's policy.<sup>4</sup> Augustin describes the drafter's first responsibility as producing a legally effective law that achieves the policy goals of the instructors.<sup>5</sup> Tanner describes the drafter's task as translating policy decisions into effective, principled and clear law.<sup>6</sup> MacCormick and Keyes describe the drafter's role as ensuring that government policy is

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<sup>1</sup> V.C.R.A.C. Crabbe, *"Legislative Drafting"*, Cavendish Publishing Ltd. 1993, p. 19.

<sup>2</sup> David C. Elliot, *"Drafting Legislation: High Quality Legislation and How to Get It"*, 1 I.J.L.D.L.R. 49 2012 p. 52, HeinOnline, <http://heinonline.org>, (accessed May 18, 2014).

<sup>3</sup> Rt. Hon. The Lord Goldsmith QC, *"Parliament for Lawyers: An Overview of the Legislative Process"*, Sir William Dale Annual Memorial Lecture, 4 Eur. J. L. Reform 511 2002, p. 513, HeinOnline, <http://heinonline.org>, (accessed May 18, 2014).

<sup>4</sup> Ian Turnbull, QC, *"Drafting Simple Legislation"*, 12 Austl. Tax F. 247 1995, p. 249, HeinOnline, <http://heinonline.org>, (accessed May 16, 2014).

<sup>5</sup> Augustin Mico, *"The Drafter's Role in the Drafting Process"*, 15 Eur. J. L. L. Reform 177 2013, p. 203, HeinOnline, <http://heinonline.org>, (accessed May 16, 2014).

<sup>6</sup> George Tanner QC, *"Imperatives in Drafting Legislation: A Brief New Zealand Perspective"*, 31 Commw. L. Bull. 33 2005, p.33, HeinOnline, <http://heinonline.org>, (accessed May 16, 2014).

expressed effectively in legislation.<sup>7</sup> According to Lortie, in a system based on specialization, the drafter's essential role is to convert general political aims into a specific and workable legal scheme.<sup>8</sup> Quiggin describes the drafter's core function as drafting legally effective, clearly expressed legislation that best achieves the instructor's policy intentions within the Government's timetable.<sup>9</sup> These various descriptions of the drafter's role are seen to focus on the transformation of government policy into law.

Experts have proven that the drafter does not only transform policy into law but that the drafter is also involved in policy. This is seen in the drafter's role at different stages of the policy process. Hague and Harrop have described the stages of the policy process.<sup>10</sup> Stefanou examines the drafter's role in each of the stages of the policy process in order to show that the drafter's input and involvement spans across most if not all of the stages and argues that what determine the extent of the drafter's role in policy are the size of the jurisdiction and the nature of the drafter's appointment.<sup>11</sup> This dissertation discusses how the drafter is

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<sup>7</sup> Katherine MacCormick and John Mark Keyes, *"Roles of Legislative Drafting Offices and Drafters"*, Role\_of\_Legislative\_Drafting\_Office.pdf, p. 11, <https://studyonline.sas.ac.uk>. (accessed April 30, 2013).

<sup>8</sup> Serge Lortie, *"Providing Technical Assistance on Law Drafting"*, Statute Law Review 31 (1), p. 5, <http://slr.oxfordjournals.org/> at IALS (accessed May 26, 2014).

<sup>9</sup> Peter Quiggin, *"Training and Development of Legislative Drafters"*, calc\_loophole\_july\_2007.pdf, p. 15, [www.opc.gov.au/calc.loophole.htm](http://www.opc.gov.au/calc.loophole.htm), (accessed September 20, 2013).

<sup>10</sup> R. Hague and M. Harrop, *"Comparative Government and Politics"*, 6<sup>th</sup> Edn (Basingstoke: Palgrave 2004) at 39, quoted in no. 11 below, p. 321. According to them, stage one is initiation, which deals with the decision to make a policy or to set an agenda. Stage two deals with formulation which involves a detailed development of policy into specific proposals. This is followed by the legislative process which is located between the formulation stage and the implementation stage and involves the passage of the proposed legislation through the Legislature. The third stage is the implementation stage where the policy is put into practice. Stage four is the evaluation stage and involves appraising the effects and successes of the policy. The fifth stage is described as the decision stage whereby a decision is taken to continue, revise or terminate the policy.

<sup>11</sup> Constantin Stefanou, *"Drafters, Drafting and the Policy Process"*, Stefanou\_Chapter\_20.pdf, pp. 319-320, <https://studyonline.sas.ac.uk>. (accessed November, 10, 2012).

involved in policy by examining the drafter's role at various stages of the policy process in Ghana and shows that despite the drafter's involvement in the policy process, there are constraints on the drafter's involvement as certain stages are reserved for policy makers to the extent that policy is the preserve of the Government.

The nature of the drafter's role and function is also seen to determine the extent of the drafter's involvement in policy which in turn shows the constraints on the drafter's involvement in policy to the extent that policy is the preserve of the Government. Mastenbroek and Tholen refer to the drafter's role as a translator, a guardian of legality or an integrating professional<sup>12</sup> and this is seen to have a consequential effect on the extent of the drafter's involvement in policy. Crabbe refers to the amanuensis function; the professional function and the composer function of the drafter and he examines their consequential effects on the drafter's involvement in policy.<sup>13</sup> This dissertation discusses how these roles and functions of the drafter determine the drafter's level of involvement in policy and examines the constraints on this involvement.

Despite the drafter's involvement in policy, there are seen to be constraints on this involvement to the extent that policy is the preserve of the Government. Hodge, Cowan and Hurford pose the ethical question of to what extent a drafter should cross the line between writing the law and influencing its

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<sup>12</sup> Ellen Mastenbroek and Berry Tholen, *"The Ethical Dilemmas of National Government Lawyers in a Europeanized Setting"*, Paper prepared for the NIG Annual Conference, Leiden, November 13, 2009, pp. 11 - 13, [www.ru.nl/.../nigpapermastenbroektholen...](http://www.ru.nl/.../nigpapermastenbroektholen...), (accessed November 16, 2013).

<sup>13</sup> V.C.R.A.C. Crabbe, *"The Ethics of Legislative Drafting"*, Commonwealth Law Bulletin, Vol. 36, No. 1, March 2010, 11 – 24, pp. 22-24.

content.<sup>14</sup> This dissertation seeks to answer that question by discussing the two extreme views of the role of a drafter described by Thornton as either having no role whatsoever in the development of policy or as taking over the development of policy from the policy makers.<sup>15</sup> Thornton's position that neither view is sustainable, as well as the views of other experts as regards finding a middle ground between the two extreme views, is discussed.

## 1.2. Background to Legislative Drafting in Ghana

Crabbe notes that in the parliamentary system of government in Ghana, the Cabinet is drawn from the Parliament. The Cabinet, which is in essence the Executive, controls the legislative programme of Parliament. An Act of Parliament, to a large extent, is thus the work of the Executive. In other words, government policy motivates legislation. He notes that the legislative policy expressed in an Act of Parliament is first determined and settled by the Government and Parliament mainly gives a Bill its stamp of approval.<sup>16</sup> Policy is therefore seen to be the preserve of the Government.

Ghana, like other Commonwealth jurisdictions, operates the centralised model of the legislative drafting system where Bills emanate from the Government with the centralised body carrying out the

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<sup>14</sup> Robyn Hodge, Mark Cowan and Richard Hurford, *"Current Developments: Ethical Issues for Drafters"*, 5<sup>th</sup> Australasian Drafting Conference, July 2008, p. 5, [www.pcc.gov.au](http://www.pcc.gov.au), (accessed January 10, 2014).

<sup>15</sup> G. C. Thornton, *"Legislative Drafting"*, Fourth Edition, Butterworths, 1996, p. 125.

<sup>16</sup> No. 1 above.

drafting function.<sup>17</sup> The Legislative Drafting Division of the Attorney-General's Department and Ministry of Justice is solely responsible for drafting all primary and secondary legislation in Ghana. The legislative drafter, who is a government lawyer and a public servant, has as a main function, the transformation of government policy into law. In the performance of that function, Crabbe notes that the Government expects the drafter to ensure that the Government's policies are given legal effect. He notes that Governments also expect the drafter to express legislative intention as accurately as possible and capable of only one interpretation, that is to say, the intention that the Government intends that law to have.<sup>18</sup>

This dissertation seeks to examine the extent of the legislative drafter's involvement in policy in the process of transforming government policy into law and to determine whether there are constraints on this involvement to the extent that policy is the preserve of the government.

### **1.3. Aims and Objectives**

The hypothesis of this dissertation is that in the transformation of government policy into law, although the legislative drafter is involved in policy, there are constraints on this involvement to the extent that policy is the preserve of the government. To prove this hypothesis, it is necessary to establish the drafter's involvement in policy as well as the constraints on this involvement given that the Government is responsible for determining policy. The aim and objective of this dissertation is therefore to show that the

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<sup>17</sup> Agnes Quartey Papafio, *"Drafting Conventions, Templates and Legislative Precedents, and their effects on the Drafting Process and the Drafter"*, 15 Eur. J. L. Reform 371 2013, p. 374, HeinOnline, <http://heinonline.org>, (accessed April 29, 2014).

<sup>18</sup> No. 1 above.

drafter in transforming government policy into law is constrained in his involvement in policy to the extent that it is the Government that determines policy.

#### **1.4. Methodology**

This dissertation examines available literature in legislative drafting to show that that the legislative drafter in transforming government policy into law is constrained in his involvement in policy to the extent that it is the Government that determines policy. The dissertation uses analytical research by using the facts already available and analyzing them to make a critical evaluation of the material. It relies on secondary legal material for research such as articles from journals and books. Arguments made by experts, legal professionals and writers are considered. Interviews are conducted with legislative drafters from the Legislative Drafting Division of the Attorney-General's Department and Ministry of Justice to determine the extent of their role in policy in the course of performing their duties. Interviews are also conducted with instructing officials who represent the executive arm of Government to determine their relationship with drafters in terms of their respective roles in the policy process.

#### **1.5 Structure**

This dissertation comprises five chapters. Chapter 1 is on the introduction. It provides an introduction of the topic and the background to legislative drafting in Ghana. The chapter also provides the aims and objectives of the dissertation, the methodology used and the structure of the dissertation.

Chapter 2 deals with the role of the legislative drafter in the policy process. The chapter examines the drafter's role in the initiation stage, formulation stage, legislative process, implementation stage, evaluation stage and the decision stage and shows that despite the drafter's involvement in some stages of the policy process, there are constraints to this involvement as certain stages are reserved for policy makers to the extent that policy is the preserve of the Government.

Chapter 3 deals with the role and functions of the legislative drafter and their consequential effects on the drafter's level of involvement in policy which in turn shows the constraints on the drafter's involvement in policy to the extent that policy is the preserve of the Government. The chapter examines the role of the drafter as a translator and the amanuensis function of the drafter; the role of the drafter as a guardian of legality; the role of the drafter as an integrating professional and the professional function of the drafter as well as the composer function of the drafter.

Chapter 4 deals with constraints on the legislative drafter's involvement in policy. It discusses the various views of authors such as that of the drafter not being involved in policy as against the drafter taking over policy from the policy maker. The chapter examines whether there is a middle ground between the two extreme views and discusses the view of there being a fine line between policy development and legislative drafting. The drafter's role in policy development is also discussed. The extent to which the drafter should be involved in policy is examined and specific examples from Ghana of the nature of the drafter's involvement in policy are given.

Chapter 5 is on the conclusion and provides a synthesis of all that has been discussed.

## CHAPTER 2: ROLE OF THE LEGISLATIVE DRAFTER IN THE POLICY PROCESS

### 2.1 Introduction to Chapter 2

It has been proven by experts that the legislative drafter's role is not restricted to just transforming government policy into law but that the drafter is also involved in policy. The drafter's involvement in policy is confirmed by examining the drafter's role in the different stages of the policy process developed by Hague and Harrop.<sup>19</sup> This chapter examines the drafter's role in the initiation stage, formulation stage, legislative process, implementation stage, evaluation stage and decision stage and shows that despite the involvement of the drafter in some stages of the policy process, there are constraints on this involvement as certain stages are reserved for policy makers to the extent that policy is the preserve of the Government.

### 2.2 Role of the legislative drafter in the initiation stage

It is noted that policy initiation is usually the preserve of government, implying that the legislative drafter has no role to play in this stage of the policy process. This view has been expressed by many authors. Crabbe refers to the classic theory that parliamentary counsel do not initiate policy and that policy issues are the preserves of others.<sup>20</sup> Similarly, Driedger states that it is not a draftsman's function either to originate or to determine legislative policy.<sup>21</sup>

Stefanou however notes that depending on the jurisdiction, the drafter's role might range from no

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<sup>19</sup> No. 10 above.

<sup>20</sup> V.C.R.A.C. Crabbe, *Document No. 11: The Role of Parliamentary Counsel in Legislative Drafting*, 2000, UNITAR, p. 12, <https://studyonline.sas.ac.uk>, (accessed April 30, 2013).

<sup>21</sup> Elmer A. Driedger, QC, *The Composition of Legislation*, 2<sup>nd</sup> Edn. Revised 1976, p. xv.

involvement in a small jurisdiction to major involvement in a large jurisdiction.<sup>22</sup> Mulitalo refers to the challenges that drafters in the South Pacific are faced with as regards abiding by the principle that drafters translate policy into law and do not make policy. She notes that if this principle were to be followed, there would hardly be any law tabled before Parliament for debate as due to the challenge of receiving incomplete policy instructions for a draft Bill, in Samoa as in most countries in the South Pacific, the few drafters are at times requested to develop policy.<sup>23</sup> This shows that in a small jurisdiction a drafter may play a major role in policy initiation.

In Ghana, an interview with Justice Crabbe shows that drafters do not play a major role in policy initiation as they do not originate the policy. However, he states that they are indirectly involved in policy initiation as they provide advice for the policy maker to consider in policy initiation. The drafter advises the Government on the feasibility or otherwise of an intended policy by writing legal opinions on behalf of the Attorney-General. The drafter gives legal advice on proposed policies, examines the various options available and provides an informed opinion for the Attorney-General's approval.<sup>24</sup> This shows the drafter's involvement in policy initiation even though the drafter does not play a major role.

### **2.3 Role of the legislative drafter in the formulation stage**

Stefanou notes that irrespective of jurisdiction this stage is dominated by legislative drafters in the

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<sup>22</sup> No. 11 above, p. 322.

<sup>23</sup> Lalotoa Mulitalo, *"The Practice of Legislative Drafting in Samoa, a Plural Society of the South Pacific"*, the Loophole - November 2012, p. 31, [www.opc.gov.au/calc.loophole.htm](http://www.opc.gov.au/calc.loophole.htm) (accessed January 2, 2014).

<sup>24</sup> Interview with Justice V.C.R.A.C. Crabbe, Statue Law Revision Commissioner, Ministry of Justice and Attorney-General's Department, 7/04/2014.

sense that they are the ones who translate instructions into actual drafts. He notes that this stage of the policy process is often referred to as the drafting of legislation.<sup>25</sup> Muhamad notes that very often the drafting stage where any gaps in the proposal should be patched and turned into perfect proposals by drafters becomes a platform for initial policy formulation stage.<sup>26</sup> In affirming the drafter's role in this stage, MacCormick and Keyes note that in recent years in Canada, drafters have been called upon to spend more time on the policy formulation aspects of their role.<sup>27</sup> These views show that the drafter plays a major role in policy formulation.

Hashim, on the other hand, states that although policy formulation and development should ideally be dealt with by ministries officials, in most cases, these policies are polished during the drafting of legislation.<sup>28</sup> This presents a contrary view, assigning the formulation and development of policy to ministries officials and restricting the role of the legislative drafter to polishing policy. Xanthaki presents the view of Jovin which expresses a similar view in terms of the drafter's role and states that in translating government policy into law, the policy is often refined or rethought by the drafter.<sup>29</sup>

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<sup>25</sup> No. 11 above, p. 323.

<sup>26</sup> Rozmizan Muhamad, *Instructions to Draft Legislation: A Study on the Legislative Drafting Process in Malaysia*, 13 Eur. J. L. Reform 236 2011, p. 256, HeinOnline, <http://heinonline.org>, (accessed May 25, 2014).

<sup>27</sup> No. 7 above, p. 21.

<sup>28</sup> Noor Azlina Hashim, *Consultation: A Contribution to Efficiency of Drafting Process in Malaysia*, 14 Eur. J. L. Reform 142 2012, p. 152, HeinOnline, <http://heinonline.org>, (accessed May 25, 2014).

<sup>29</sup> Helen Xanthaki, *Legislative Techniques in Rwanda, Present and Future*, 15 Eur. J. L. Reform 95 2013, p. 96, HeinOnline, <http://heinonline.org> (accessed May 16, 2014).

Laws places the choice of the level of involvement in policy formulation on the drafter and states that the drafter's understanding of how translating policy into legislation may produce obtuseness will enable him to decide how far to be involved in policy formulation.<sup>30</sup>

In Ghana, an interview with Mr. Henry Tackey shows that drafters play a pronounced role in the policy formulation stage. He notes that before drafting legislation, the drafter is expected to conduct a background research about the legislative proposal and relevant laws and policies in the jurisdiction and in other jurisdictions in order to learn from the difficulties faced and how these difficulties have been addressed. The proposal is then subjected to a critical analysis to prevent undesirable consequences.<sup>31</sup> This shows that the drafter has a high level of involvement in policy formulation.

#### **2.4 Role of the legislative drafter in the legislative process**

According to Stefanou, irrespective of the size of jurisdiction, the legislative drafter is most active during this period.<sup>32</sup> In Ghana the mode of exercising legislative power is provided for in article 106 of the 1992 Constitution of the Republic of Ghana<sup>33</sup> and in Orders 122 to 135 of the Standing Orders of the

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<sup>30</sup> Stephen Laws, “*Giving Effect to Policy in Legislation: How to Avoid Missing the Point*”, Statute Law Review Advance Access published January 22, 2011, Statute Law Review 0 (0) 1- 16, p. 2, <http://slr.oxfordjournals.org/> at Institute of Advanced Legal Studies (accessed February 8, 2013).

<sup>31</sup> Interview with Mr. Henry Tackey, Chief State Attorney, Legislative Drafting Division, Ministry of Justice and Attorney-General’s Department, 8/04/2014.

<sup>32</sup> No. 11 above, p. 325.

<sup>33</sup> Appendix A – Article 106 of the 1992 Constitution of the Republic of Ghana.

Parliament of the Republic of Ghana.<sup>34</sup>

A Bill may be introduced in Parliament by a Minister of State, a Deputy Minister of State or a Private Member. The First Reading Stage is where the Long Title of the Bill is read for the first time in Parliament. The drafter is not involved in this stage. The Bill is then referred to the appropriate committee which examines the Bill in detail and makes necessary inquiries in relation to the Bill. An interview with Mr. Tackey reveals that the drafter is very active at this stage since the drafter is required to be present to advise the Members of Parliament about the rationale for the language used in the draft Bill and any amendments which may be in conflict with the law and also to draft the proposed amendments. Where the Bill has been deliberated upon by the appropriate committee, that committee submits a report on it to the House which leads to the Second Reading Stage. Where after a Bill has been read a second time, more than twenty amendments are proposed to it, there may be a Winnowing Process which requires the drafter's presence to provide advice where necessary.

The next stage is the Consideration Stage whereby the House may only discuss the details of a Bill and not the principle of it. The Bill is examined clause by clause at this stage which requires the drafter's presence as the drafter may be sought by the clerk on a matter for discussion. The Third Reading is the last stage that a Bill has to go through in the House. According to Mr. Tackey, the drafter is not required at this stage.<sup>35</sup>

The above discussion shows that that the drafter plays an active role in the legislative process with

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<sup>34</sup> Appendix B – Orders 122 to 135 of the Standing Orders of the Parliament of the Republic of Ghana.

<sup>35</sup> No. 31 above.

a more pronounced role in certain stages than in others.

## **2.5 Role of the legislative drafter in the implementation stage**

Stefanou notes that generally legislative drafters in Common Law jurisdictions are not involved in policy implementation. He however states that in small jurisdictions, the drafter's membership of the civil service means that they might be called upon to implement their own drafts.<sup>36</sup>

In Ghana, an interview with Mrs. Estelle Appiah reveals that the drafter does not play a role in the implementation stage as the stage is reserved for instructing officials and policy makers.<sup>37</sup> An interview with Dr. Kofi Mbiah confirms that the instructing officials are the ones who implement the policy or legislation. Dr. Mbiah was responsible for the implementation of the Ghana Shippers Authority Regulations, 2012 (L.I. 2190).<sup>38</sup> This shows a constraint on the involvement of the drafter in policy to the extent that policy is the preserve of the Government.

## **2.6 Role of the legislative drafter in the evaluation stage**

The legislative drafter is involved in the evaluation stage as the drafter does not just transform government policy into law but also analyses the policy to find out its efficiency, effects and loopholes. Bowman notes that the drafter's main and most valuable function is to subject policy ideas to a rigorous intellectual analysis and not just to turn policy ideas into a kind of special statutory language.<sup>39</sup>

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<sup>36</sup> No. 11 above, p. 326.

<sup>37</sup> Interview with Mrs. Estelle Appiah, former Director of the Legislative Drafting Division of the Ministry of Justice and Attorney-General's Department, (2005-2011), 19/03/2014.

<sup>38</sup> Interview with Dr. Kofi Mbiah, Chief Executive Officer of the Ghana Shippers Authority, 27/03/2014.

<sup>39</sup> Geoffrey Bowman, "Why is there a Parliamentary Counsel Office?", 2005 Statute Law Review 26 (2), 69-81, p. 73,

In Ghana, an interview with Mrs. Appiah reveals that drafters' involvement in the evaluation stage is seen in their examination and analysis of the legislation which results from the policy. She states that a drafter may examine legislation to see whether an entire legislation should be repealed for new legislation to take its place or whether amendments should be made to existing legislation in order to address the inadequacies in the legislation and give the required advice to the Attorney-General for the Attorney-General's approval.<sup>40</sup> It can therefore be seen that the drafter plays a pronounced role in the evaluation stage.

### **2.7 Role of legislative drafter in the decision stage**

According to Stefanou, this stage of the policy process has the weakest and practically always indirect input by legislative drafters. He notes that drafters' views on policy are not going to influence the philosophy of a government's approach to policy.<sup>41</sup> It can therefore be seen that the drafter does not play any role at this stage of the policy process as decision making is the preserve of the Government. According to Mrs. Appiah, this is also the case in Ghana as drafters in Ghana do not play a role in the decision stage which is reserved for policy makers.<sup>42</sup>

### **2.8 Summary of Chapter 2**

The examination of the drafter's role at various stages of the policy process shows that while the

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<https://studyonline.sas.ac.uk> (accessed April 30, 2013).

<sup>40</sup> No. 37 above.

<sup>41</sup> No. 11 above, p. 329.

<sup>42</sup> No. 37 above.

drafter in Ghana plays a pronounced role in the formulation stage, the legislative process and the evaluation stage, there are also constraints to the drafter's involvement in policy as certain stages of the policy process, namely the initiation, implementation and decision stages are seen to be reserved for the policy makers, to the extent that policy is the preserve of the Government.

This dissertation will proceed to discuss how the nature of the role and function of the drafter determines the drafter's level of involvement in policy which in turn shows the constraints on the drafter's involvement in policy to the extent that policy is the preserve of the Government.

## **CHAPTER 3: ROLES AND FUNCTIONS OF THE LEGISLATIVE DRAFTER AND THEIR CONSEQUENTIAL EFFECTS ON THE LEGISLATIVE DRAFTER'S LEVEL OF INVOLVEMENT IN POLICY**

### **3.1 Introduction to Chapter 3**

Having established that the legislative drafter is involved in policy by examining the drafter's role in the stages of the policy process and having shown that despite the drafter's involvement in some stages of the policy process, there are constraints to this involvement as certain stages are reserved for policy makers to the extent that policy is the preserve of the Government, it is necessary to examine the extent of the drafter's involvement in policy.

This can be done by examining the different roles and functions of the drafter and their consequential effects on the drafter's level of involvement in policy. This Chapter will discuss the role of the drafter as a translator and the amanuensis function of the drafter; the role of the drafter as a guardian of legality; the role of the drafter as an integrating professional and the professional function of the drafter as well as the composer function of the drafter, while examining their consequential effects on the drafter's level of involvement in policy which in turn shows the constraints on the drafter's involvement in policy to the extent that policy is the preserve of the Government. The drafter's role as a translator, guardian of legality or an integrating professional is referred to as this has been identified in the bibliography researched namely in the article by Mastenbroek and Tholen.<sup>43</sup> The amanuensis, professional and composer functions of the drafter have also been referred to as they have been identified in the bibliography researched,

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<sup>43</sup> No. 12 above.

specifically in the article by Crabbe.<sup>44</sup> Another reason for choosing to refer to these roles and functions of the drafter is that some of these roles and functions are seen to be prevalent in Ghana as will be shown in the ensuing discussion.

### **3.2 Role of the legislative drafter as a translator and the amanuensis function of the legislative drafter**

The role of the legislative drafter as a translator and the drafter's amanuensis function are seen to have a consequential effect on the drafter's level of involvement in policy. Mastenbroek and Tholen note that according to Purdy the drafter should be a translator of his client's wishes<sup>45</sup> and that according to MacNair, the drafter should give effect to his superiors' instructions by transforming these into legal terminology.<sup>46</sup> They also note that according to Purdy, the drafter in this role conception is not responsible for ensuring the legality or constitutionality of a bill, but should act as directed and that legal considerations do not count.<sup>47</sup>

With reference to the amanuensis function of the drafter, Crabbe notes that under this function, the drafter learns to appreciate the limits on his responsibilities and leaves policy decisions for policy makers. He notes that the drafter's responsibility in this regard is to comprehend and translate the policy into

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<sup>44</sup> No. 13 above.

<sup>45</sup> Roger Purdy, "Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems", 11 Seton Hall Legis. J. 67 1987 – 1988, p. 80, quoted in no. 12 above, p. 11.

<sup>46</sup> Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective", Statute Law Rev (2003) 24 (2): 125, p. 145, quoted in no. 12 above, p. 11.

<sup>47</sup> No. 45 above, pp. 79, 95.

legislative form.<sup>48</sup>

It can therefore be seen that where the drafter acts as a translator and performs an amanuensis function, the drafter is seen not to be actively involved in policy but rather as conveying the wishes of the instructing agency by translating the policy into law, which shows a major constraint on the drafter's involvement in policy.

There are however, contrary views to the notion of the drafter acting as a translator and this amanuensis function of the drafter. Purdy's view of the drafter as a translator who should act as directed may be contrasted with Crabbe's view that the drafter is essentially a lawyer first and a drafter second and that on receipt of drafting instructions, preliminary questions of the unconstitutionality of a proposal must be answered.<sup>49</sup> Similarly, Seidman and Seidman note that the drafter is not a mere scrivener but plays the dual role of scrivener and designer in the bill drafting process.<sup>50</sup> Marcello also notes that drafting decisions are often influenced by the drafter's advocacy agenda and that the drafter plays a more active role in the drafting process than is generally accorded to the stereotypical scribe.<sup>51</sup>

Other authors have expressed similar views as to the drafter's role not being just that of a translator and not just performing an amanuensis function. Dickerson describes as a false assumption that the

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<sup>48</sup> No. 13 above, p. 22.

<sup>49</sup> No. 13 above, p. 24.

<sup>50</sup> Ann Seidman and Robert B. Seidman, "*ILTAM: Drafting evidence-based legislation for Democratic Social Change*", Boston University Law Review (Vol. 89: 435) p. 443, [www.bu.edu/law/central/jd/organizations/journals/.../SEIDMAN\\_000.pdf](http://www.bu.edu/law/central/jd/organizations/journals/.../SEIDMAN_000.pdf), (accessed January 10, 2014).

<sup>51</sup> David A. Marcello, "*The Ethics and Politics of Legislative Drafting*", Tulane Law Review, Vol. 70, p. 2437, 1996, SSRN: <http://ssrn.com/abstract=1763214>, (accessed January 6, 2014).

draftsman's main function is to frost the legislative cake as in couching the proposal in appropriate legislative jargon and polishing the numbering, paragraphing and technical details.<sup>52</sup> Salembier notes that drafters are not just scribes who simply copy down what the instructing official wants to say. According to him, drafters draft, they do not take dictation. Their job is instead to take the client's policies and transform them into text that will promote those policies as effectively as possible.<sup>53</sup> Revell notes that the drafter's role is much more than just putting words on a page; instead the drafter is hired to engage in legal thinking.<sup>54</sup> Similarly Rani notes that while translating the policy, a drafter needs to check if the directive is in consonance with the principles of natural justice and that counsel's job is not just transcription but to uncover any pitfalls that might trap the Government as well as the Legislature.<sup>55</sup>

Similarly, Hull notes that far from regarding legislative counsel as a mere penman, the instructing officer relies on what he takes to be counsel's expertise not only in composition and law but also in the substance of the legislative proposal.<sup>56</sup> Horn sounds a warning that the drafter, intent on wordsmithing, who declines to take an active role in shaping policy, runs the risk of drafting beautifully expressed laws that are not fit for purpose.<sup>57</sup> These views show that the drafter's role transcends that of a translator who performs

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<sup>52</sup> Reed Dickerson, "Professionalizing Legislative Drafting: A Realistic Goal", 60 A. B. A. J. 562 1974, p. 562, HeinOnline, <http://heinonline.org>, (accessed May 17, 2014).

<sup>53</sup> Paul Salembier, "Testing Client Policy: the Emperor's Clothes", Loophole – August 2011, pp. 44-45, [www.opc.gov.au/calc.loophole.htm](http://www.opc.gov.au/calc.loophole.htm), (accessed August 4, 2011.)

<sup>54</sup> Donald L. Revell, "Enhancing the Legislative Process: The Value of the Legislative Drafter", Statute Law Review 32 (2), 149-160, p. 154, doi:10.1093/slr/hmr005, <http://slr.oxfordjournals.org> at Institute of Advance Legal Studies, (accessed April 30, 2014).

<sup>55</sup> Sudha Rani, "The Role and Efficacy of Legislation", The Loophole – November 2011, Loophole\_Nov11.pdf, p. 75, [www.opc.gov.au/calc.loophole.htm](http://www.opc.gov.au/calc.loophole.htm), (accessed November 4, 2011).

<sup>56</sup> David Hull, "The Role of Legislative Counsel: Wordsmith or Counsel [1]", Calc\_loophole\_August2008.pdf, p.36, [www.opc.gov.au/calc.loophole.htm](http://www.opc.gov.au/calc.loophole.htm), (accessed August 13, 2011.)

<sup>57</sup> Nick Horn, "Shaping Policy into Law: A Strategy for Developing Common Standards", The Loophole Special Issue:

an amanuensis function.

From the above discussions, it can be seen that where the drafter is considered as a translator, the level of the drafter's involvement in policy is low as the drafter is restricted to merely translating the policy into law, a role which has been likened by authors to penmanship, transcription and performing the functions of an amanuensis. This role of a translator therefore shows that there is a major constraint on the drafter's involvement in policy as the drafter mostly conveys the wishes of the instructing agency by translating the policy into law. On the other hand, where the drafter is not regarded as a translator, the drafter is seen to play a more active role in shaping policy through his analysis of the proposed policy and his consideration of legal issues.

In Ghana, an interview with Ms. Agnes Quartey Papafio reveals that drafters neither play the role of a translator nor perform an amanuensis function. Far from just acting as directed without taking legal considerations into account as advocated by Purdy,<sup>58</sup> she states that the drafter in Ghana analyzes policy proposals and questions their constitutionality.<sup>59</sup> The drafter's role therefore transcends that of an amanuensis as he plays an active role in policy.

### **3.3 Role of the legislative drafter as a guardian of legality**

The legislative drafter's role as a guardian of legality as described by Mastenbroek and Tholen<sup>60</sup> is

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9 February 2011, p. 42, [www.opc.gov.au/calc.loophole.htm](http://www.opc.gov.au/calc.loophole.htm), (accessed April 16, 2014).

<sup>58</sup> No. 45 above, pp. 79, 95.

<sup>59</sup> Interview with Ms. Agnes Quartey Papafio, Senior State Attorney, Legislative Drafting Division of the Ministry of Justice and Attorney-General's Department, 29/04/14.

<sup>60</sup> No. 12 above, pp. 11-12.

also seen to have a consequential effect on the level of the drafter's involvement in policy. Mastenbroek and Tholen refer to MacNair who notes that a drafter's cardinal duty is to ensure the rule of law.<sup>61</sup> They refer to Wendel's view that the drafter does not only work for his direct superior, but has a moral obligation to respect the law.<sup>62</sup> The authors note that Moss similarly states that the government lawyer should steer clear from policy influences and work from the best view of the law, delivering objective advice uncoloured by the exigencies of a particular policy goal.<sup>63</sup> The drafter thus becomes a guardian of legality rather than a translator of his client's policy wishes.

Similarly, experts such as Laws describe drafters as advocates for the protection of the statute book<sup>64</sup> and Erasmus quotes Bennion who describes drafters as keepers of the statute book.<sup>65</sup> Similarly, Levert describes drafters as guardians of the statute book.<sup>66</sup> Jamieson describes the drafter as a custodian and also a servant of a province of constitutional laws.<sup>67</sup> Seidman notes that the role of drafters requires

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<sup>61</sup> No. 46 above.

<sup>62</sup> W. B. Wendel, "*Professionalism and Interpretation*", *Northwestern University Law Review* (2005), 99 (Spring), 1167 – 1233, quoted in no. 12 above, p. 11.

<sup>63</sup> R. D. Moss, "*Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*", *Administrative Law Review*, (2000) 52, 1303-1330, pp. 1306, 1310, quoted in no. 12 above, p. 12.

<sup>64</sup> Stephen Laws, "*The Role of Legislative Counsel: Wordsmith or Counsel?* (2), *Calc\_loophole\_ August2008.pdf*, p. 43, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed September 18, 2013).

<sup>65</sup> Janet Erasmus, "*Keepers of the Statute Book: Lessons from the space-time continuum*", *Loophole* January 2010.pdf, p.7, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed September 18, 2013).

<sup>66</sup> Lionel A. Levert QC, "*Work Methods and Processes in a Drafting Environment*", *The Loophole*, Special Issue 9 February, 2011, p. 36, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed April 16, 2014).

<sup>67</sup> N. J. Jamieson, "*Would a Parliamentary Counsel by Any Other Name be More of a Law Draftsman?*", 1982 *Statute L. Rev.* 13 1982, p. 14, *HeinOnline*, <http://heinonline.org>, (accessed May 17, 2014).

them to protect the rule of law and states that drafters must design legislation to ensure legality.<sup>68</sup> Similarly, Markman notes that a central skill for a drafter is to be able to draft in a way that is harmonious with the rest of the statute book and therefore minimize the risk of a successful challenge to legislation based on unintentional variations in word choice or structure.<sup>69</sup>

These views portray the drafter as a guardian of legality and a keeper of the statute book. As a guardian of legality the drafter is seen to be concerned with protecting the statute book and ensuring that the proposed legislation is constitutional. This is likely to lead to the drafter being more focused on the law and steering clear from policy influences, as advocated by Moss,<sup>70</sup> resulting in a low involvement of the drafter in policy.

The view of Moss of the drafter steering clear of policy influences and working from the best view of the law<sup>71</sup> may be contrasted with that of Keyes who notes that it is the responsibility of drafters not only to advise of the potential for an unconstitutional finding but also to comply with Ministers' instructions about whether to proceed with legislation despite that potential.<sup>72</sup> Keyes' view suggests that even though the drafter may be in charge of guarding the statute book by ensuring that provisions are constitutional and are in consonance with other laws, the drafter is bound to comply with the instructions of the Executive given

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<sup>68</sup> Robert B. Seidman, "Drafting for the Rule of Law: Maintaining Legality in Developing Countries," 12 Yale J. Int'l L. 84 1997, pp. 93, 118, HeinOnline, <http://heinonline.org>, (accessed May 16, 2014).

<sup>69</sup> Sandra C. Markman, "Training of Legislative Counsel: Learning to Draft without Nellie", Commonwealth Law Bulletin, Vol. 36, No. 1, March 2010, p. 31.

<sup>70</sup> No. 63 above.

<sup>71</sup> Ibid.

<sup>72</sup> John Mark Keyes, "Professional Responsibilities of Legislative Counsel", Loophole October2009.pdf, pp. 52-53, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed December 20, 2013).

that policy making is the preserve of the Government.

In Ghana, an interview with Mr. Tackey reveals that the drafter does not play the role of a guardian of legality who steers clear from policy influences as the drafter is a public servant who is answerable to the Executive. He states that although the drafter must ensure that provisions are constitutional and are in consonance with the rest of the statute book by asking questions such as whether there is constitutional legitimacy, the drafter is still constrained by the policy goals of the Executive.<sup>73</sup>

### **3.4 Role of the legislative drafter as an integrating professional and the professional function of the legislative drafter**

The legislative drafter's role as an integrating professional as described by Mastebroek and Tholen<sup>74</sup> and the professional function of the drafter as described by Crabbe<sup>75</sup> are also seen to have a consequential effect on the level of the drafter's involvement in policy.

Mastebroek and Tholen describe this role as an intermediate role<sup>76</sup> and they refer to Moss who notes that the lawyer may assess the relative merits of competing arguments for his client but ultimately should not be a road block to administration policy.<sup>77</sup> Mastebroek and Tholen note that this intermediate role is less extreme than that of the translator as it accepts that there are legal and constitutional limitations

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<sup>73</sup> No. 31 above.

<sup>74</sup> No. 12 above.

<sup>75</sup> No. 13 above, p. 23.

<sup>76</sup> No. 12 above, p. 12.

<sup>77</sup> No. 63 above, p. 1306.

to policy wishes which must be guarded by the drafter.<sup>78</sup> They note that Moss however states that if the legal hurdles are clearly insurmountable, the lawyer should block his superior from reaching the policy objectives.<sup>79</sup> This view seems to advocate for the drafter to play an active role in policy to the extent of preventing his superior from achieving the superior's intended goals.

This view of Moss of the lawyer blocking his superior from reaching his policy objectives may be contrasted with that of Crabbe who admonishes drafters not to usurp the role of a policy maker and not to seek to dictate policy. Crabbe advises drafters to appreciate their own limitations and to be objective as seasoned legal advisors.<sup>80</sup> Similarly, Keyes notes that drafters have a responsibility not only to advise of the potential for an unconstitutional finding but also to comply with the instructions of ministers about whether to proceed with legislation despite that potential. Keyes notes that drafters are not judges and do not exercise power over ministers or elected members.<sup>81</sup> Page, similarly notes that while drafters can seek to persuade Ministers to change their minds, like other civil servants, they can be and are overruled by Ministers who can insist on having their own way.<sup>82</sup> These views show that the view of Moss of a lawyer blocking his superior from attaining his policy objectives may be rather far-fetched and impractical, given that policy is the preserve of the Government.

Other authors are also seen to refer to the drafter's role as an integrating professional which

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<sup>78</sup> No. 12 above, p. 12.

<sup>79</sup> No. 63 above, p. 1306.

<sup>80</sup> No. 13 above, p. 17.

<sup>81</sup> No. 72 above.

<sup>82</sup> Edward C. Page, "*Their word is law: parliamentary counsel and creative policy analysis*", Public Law 2009, p.13, <https://studyonline.sas.ac.uk>, (accessed November 27, 2012).

embodies the drafter's professional function. According to Crabbe, under the professional function, parliamentary counsel must anticipate the legal difficulties and the pitfalls, the inadequacies in the policy and the relationship between the policy and the existing body of law.<sup>83</sup> Laws notes that the drafter's responsibility, when giving effect to the wishes of instructors, becomes that of providing legislation that yields its meaning clearly in a way that cannot be falsified by anything including external material or extraneous analysis.<sup>84</sup>

The drafter's role as an integrating professional is also seen to be referred to as a collaborative role. Argument quotes Quiggin who notes that the drafter has a collaborative role and is expected to work with the instructing area to analyze policy, provide alternatives and resolve problems.<sup>85</sup> Similarly, Tanner notes that drafters must be able to identify the flaws in legislative proposals suggest alternatives and sometimes mediate between competing points of view.<sup>86</sup> Salembier refers to the drafter as playing a legal advisory role and notes that it is always in the client's best interest to have legislative counsel, in his role as legal adviser, point out any errors or inconsistencies that might prevent the client's objectives from being realized.<sup>87</sup> Similarly, Kobbah quotes that a considerable part of the drafter's work is in analyzing instructions, asking for clarification and pointing out gaps, anomalies and ambiguities in the legislative

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<sup>83</sup> No. 13 above, p. 23.

<sup>84</sup> Stephen Laws, *"Plus ça change? Continuity and Change in UK Legislative Drafting Practice"*, 11 Eur. J. L. Reform 139 2009, p. 155, HeinOnline, <http://heinonline.org>, (accessed May 17, 2014).

<sup>85</sup> Stephen Argument, *"Straddling a Barbed Wire Fence: Reflections of a Gamekeeper, turned Poacher, turned Gamekeeping Poacher"*, *calcloopholeOct2007.pdf*, p. 68, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed September 20, 2013).

<sup>86</sup> No. 6 above, p. 35.

<sup>87</sup> No. 53 above, p. 57.

proposal.<sup>88</sup> Revell also describes the drafter's role as identifying potential policy gaps including potential problems in administration and enforcement and assisting the client to find solutions as part of the drafting process.<sup>89</sup>

From the discussions above, it can be seen that the drafter's role as an integrating professional transcends the drafter's role as a translator as the drafter is seen to move beyond merely transcribing the wishes of policy officials into law and merely acting as directed without any analysis of the policy proposals. This role is also seen to transcend that of the drafter as a guardian of legality whose sole focus is on guarding the statute book even to the point of steering clear from policy influences. The drafter as an integrating professional is seen to play an intermediate, collaborative role, working together with instructing officials to analyze policy, identify pitfalls and propose solutions. He does not merely translate the wishes of instructing officials into law but also analyzes them and suggests alternatives. Also, although the drafter is concerned about guarding the statute book, the drafter does not totally disregard the policy influences of instructing officials but rather analyzes the policy, pointing out gaps and assisting in finding solutions. The drafter, as an integrating professional, is therefore seen to have a high level of involvement in policy with constraints on this involvement to the extent that policy making is reserved for policy officials.

In Ghana, an interview with Mr. Paul Owusu-Appiah reveals that drafters play the role of integrating professionals as discussed above. He states that in Ghana the drafter does not prevent the policy maker from reaching his policy objectives as the drafter is a public servant and answerable to the Executive. The

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<sup>88</sup> Joseph G. Kobbah, "*Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone*", 10 Eur. J. L. Reform 219 2008, p. 231, HeinOnline, <http://heinonline.org>, (accessed May 16, 2014).

<sup>89</sup> No. 54 above, p. 156.

drafter rather identifies the pitfalls and suggests alternatives to the policy maker.<sup>90</sup> This view of the drafter's role is confirmed by Mr. J.M.Y. Amegashie. He notes that in the development of the Driver and Vehicle Licensing Authority (Private Vehicle Testing Stations) Regulations, 2012 (L.I. 2192), the Legislative Drafting Division did not prevent the Authority from reaching the desired policy objectives but rather pointed out provisions in the instructions which would be difficult to enforce and suggested alternatives to these provisions which were accepted by the Authority.<sup>91</sup> This shows that although the drafter is actively involved in policy, there are constraints to his involvement in policy and he does not dictate to the Executive since policy is the preserve of the Government.

### **3.5 Composer function of legislative drafter**

The composer function of the drafter is also seen to determine the drafter's level of involvement in policy. Crabbe describes the composer function as the test of the drafter's competency. He describes that test as the ability to communicate the law to the audience, that is, to the policy makers, to Parliament, to the prudent man of the law, to the reasonable man of the law whose life is affected by the law and finally to the courts.<sup>92</sup>

Thornton also acknowledges this composer function of the drafter by referring to the drafter's creative role. He notes that a drafter's proper role is more creative than that of a mere wordsmith.

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<sup>90</sup> Interview with Mr. Paul Owusu-Appiah, retired Chief State Attorney, Legislative Drafting Division of the Ministry of Justice and Attorney-General's Department, with a drafting career spanning from 1985-2011, 25/06/2014.

<sup>91</sup> Interview with Mr. J.M.Y. Amegashie, former Chief Executive Officer of the Driver and Vehicle Licensing Authority, 30/06/2014.

<sup>92</sup> No. 13 above, p. 23.

According to him, the drafter has skills and knowledge not generally possessed by policy makers.<sup>93</sup> Quoting Hart and Sacks, he notes that the drafter is an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all.<sup>94</sup>

Dickerson stresses the importance of involving the drafter in the initial stages of the policy process in view of the drafter's composer function. He describes the drafter's job as being to help his client put in legal form what the client wants in substance and to help the client accomplish it as effectively as possible. To this end he compares the drafter to an architect or engineer and stresses that the drafter must be brought into the particular problem long before he picks up his pencil.<sup>95</sup> The necessity of involving the drafter at the initial stages of the policy process is also acknowledged by Crabbe. He notes that the ability to discern the thin dividing line between policy and implementation, between practice and procedure, between the motive and the motivation and between the problem and the solution of the problem make parliamentary counsel candidates for early participation in the policy issues that lead eventually to the drafting of legislation.<sup>96</sup>

Bowman also acknowledges the creative role of the drafter. He notes that the drafter has a creative function but has to be careful because it is not for him to make up policy and at the same time, it is part of

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<sup>93</sup> No. 15 above.

<sup>94</sup>Hart Jr and A.M. Sacks, *"The Legal Process: Basic Problems in the Making and Application of Law"*, (Cambridge Tentative edn, 1958) p. 200, quoted in no. 15 above, p.125.

<sup>95</sup> Reed Dickerson, *"The Fundamentals of Legal Drafting"*, 1986, 3<sup>rd</sup> edn., Little, Brown and Company, p. 9.

<sup>96</sup> No. 1 above, p. 21.

his job to offer workable solutions when possible.<sup>97</sup> In affirming the drafter's creative function, Nampoothiry describes the drafter as a creative artist dealing with policies and conceptualizing them into legislative provisions in an eloquent and logical sequence.<sup>98</sup> Markman, in alluding to the drafter's creative function, states that if asked to draft a hammer to kill a fly, a good drafter must know enough to suggest the use of a fly-swatter instead, and perhaps even make a brand recommendation.<sup>99</sup>

From the above discussions, it can be seen that the drafter's function as a composer shows a high level of involvement of the drafter in policy. This function requires the drafter to be creative, to make suggestions and to propose alternatives. The drafter is required to be part of the initial formulation process and to play the role of an architect and an engineer. It is seen as very distinct from the drafter's role as a translator who acts as a wordsmith, simply transcribing the policy wishes of the Executive and acting as directed with no involvement in policy. In exercising this function however, the drafter is admonished not to make up policy as policy is the preserve of the Government, which shows a constraint on the drafter's involvement in policy.

In Ghana, an interview with Mr. Owusu-Appiah shows that drafters perform a composer function. He states that the drafter exercises creativity in the transformation of government policy into law and does not simply translate the policy wishes of the Executive into law without a previous analysis. According to him, the drafter is however cautious enough not to make up policy which is the preserve of the

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<sup>97</sup> Geoffrey Bowman, "*The Art of Legislative Drafting*", European Journal of Law Reform, Vol. VII, no. ½, Crown Copyright 2006, p. 5, <https://studyonline.sas.ac.uk>, (accessed October 5, 2012).

<sup>98</sup> N. K. Nampoothiry, "*The Role of Parliamentary Counsel in Legislative Drafting*", Commonwealth Law Bulletin, Vol. 36, No. 1, March 2010, p.60.

<sup>99</sup> No. 69 above, p. 29.

Government.<sup>100</sup>

### 3.6 Summary of Chapter 3

This Chapter has examined the various roles and functions of the drafter and their consequential effects on the drafter's level of involvement in policy as well as the resultant constraints on the drafter's involvement in policy. It is seen that where the drafter plays the role of a translator and performs an amanuensis function, the drafter is not involved in policy but rather focuses on conveying the wishes of the instructing agency by translating the policy into law which in turn shows a major constraint on the drafter's involvement in policy. Where the drafter performs the role of a guardian of legality, the drafter is seen to be concerned with protecting the statute book to the extent of even disregarding the policy influences of the Executive. As an integrating professional, the drafter is seen to have a high level of involvement in policy. The composer function of the drafter also shows the drafter's creativity and a high level of involvement of the drafter in policy. It is noted that in Ghana, the drafter plays the role of an integrating professional and performs a composer function. It is noted however that although this role and function entail a high level of involvement of the drafter in policy, the drafter is constrained as the drafter cannot dictate policy or make policy decisions since policy is the preserve of the Government.

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<sup>100</sup> No. 90 above.

## **CHAPTER 4: CONSTRAINTS ON THE LEGISLATIVE DRAFTER'S INVOLVEMENT IN POLICY**

### **4.1 Introduction to Chapter 4**

Despite the drafter's involvement in policy, there are seen to be constraints on this involvement to the extent that policy is the preserve of the Government. Hodge, Cowan and Hurford pose the question of to what extent a drafter should cross the line between writing the law and influencing its content.<sup>101</sup> In attempting to answer this question, this Chapter will discuss two extreme views on the role of the drafter with respect to policy referred to by Thornton as either having no role whatsoever in the development of policy or as taking over the development of policy from the policy makers and subsequently examine whether there is a middle ground between the two extreme views, as noted by Thornton.<sup>102</sup>

### **4.2 Legislative drafter not to be involved in policy**

Thornton notes that one extreme view of the role of the drafter is that of simply selecting words as if from a shelf and putting them in the right order. According to Thornton, this view holds that policy is for policy makers alone and that the drafter should act as instructed without regard to fundamental principles, practicality or anything else.<sup>103</sup> This view is seen to be similar to the view of the drafter playing the role of a translator who acts as a wordsmith as discussed earlier.

This view of a drafter not being responsible for policy is expressed by various authors. Hodge, Cowan and Hurford refer to the traditional expectation of the role of the drafter in policy being that the

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<sup>101</sup> No. 14 above.

<sup>102</sup> No. 15 above.

<sup>103</sup> Ibid.

drafter will faithfully reflect the Government's decisions and policies in effective legislation.<sup>104</sup> Driedger states that it is not the draftsman's function to originate or to determine legislative policy.<sup>105</sup> Dickerson states that the drafter, although entitled to point out policy considerations involved in the draft, must take every precaution against the unwelcome injection of his own views into the policy features of the Bill. He notes that the drafter does not make substantive policy in the sense of having responsibility for its wisdom or of making final decisions on what is to be done and its desirability.<sup>106</sup>

Grant, in describing the drafter's role with regard to policy, notes that the drafter is required to give effect to the Government's policy decisions by drafting the instrument that will turn the current law from what it is now to what it ought to be. She deduces that it follows therefore, that in no way is it part of the drafter's brief to decide what the law ought to be.<sup>107</sup>

Similarly, Nzerem admonishes that it should never be thought that it is the drafter's function either to initiate legislative policy or to determine policy as that rests squarely in the domain of the instructing authority, namely the Government.<sup>108</sup> Levert also notes that drafters are not policy developers and should not be expected to do both the policy formulation and the legislative drafting for a particular government

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<sup>104</sup> No. 14 above.

<sup>105</sup> No. 21 above.

<sup>106</sup> No. 95 above, p. 10.

<sup>107</sup> Elizabeth Grant, "*The Wavering Line between Policy Development and Legislative Drafting*", Loophole-August 2011, p. 60, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed September 20, 2013).

<sup>108</sup> Richard C. Nzerem, "*Prioritising Legislative Proposals in the Legislative Process*", Commonwealth Law Bulletin, Vol. 36, No. 1, March 2010, p. 68.

initiative.<sup>109</sup>

However, in the same breath, some of these authors criticize this view of the drafter not being involved in policy and note that drafters do have a role to play in policy. Hodge, Cowan and Hurford note that that this view of the drafter faithfully reflecting the Government's decisions and policies in effective legislation limits the drafter's input to the selection of words and arrangement of provisions.<sup>110</sup> Driedger states that although the draftsman is not responsible for policy, he must nevertheless consider whether the prescribed policy is capable of implementation. He notes that the draftsman also contributes in rounding out the policy and filling in the details.<sup>111</sup> Similarly, Levert notes that although drafters are not supposed to be involved in policy, undoubtedly policy developers and drafters must work closely together when developing a given piece of legislation and that there will always be room for at least some policy work to be done by drafters, such as challenging policy assumptions or fleshing out incomplete policies.<sup>112</sup>

In criticizing the view of policy being for policy makers alone and of drafters being expected to act as instructed without regard to fundamental principles, Crabbe poses the question as to how one can translate policy without understanding that policy? He states that it is inevitable for drafters to get involved in policy considerations. He asserts that the training given to drafters as well as their knowledge of the existing law and their experience of the probable consequences of a piece of legislation place them on a pedestal from which they have to be consulted on policy issues and from which they need to advise and

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<sup>109</sup> No. 66 above, p. 31.

<sup>110</sup> No. 14 above.

<sup>111</sup> No. 21 above.

<sup>112</sup> No. 66 above, p. 31.

warn.<sup>113</sup> Similarly, Dickerson in acknowledging the importance of understanding the policy required to be transformed into law, states that a draftsman who allows himself to be less than fully informed on both the underlying policies to be expressed and their background is not discharging his central responsibility.<sup>114</sup>

An interview with Justice Crabbe reveals that the extreme view of drafters not being involved in policy at all does not apply to Ghana. He states that in Ghana, drafters are involved in policy.<sup>115</sup> This will be further examined in this dissertation.

#### **4.3 Legislative drafter to take over policy from policy maker**

Another extreme view of the role of drafters, as expressed by Thornton, is that of it being the drafter's responsibility to take over from the policy makers by developing incomplete policy to a refined and completed state.<sup>116</sup> This view of drafters is seen to apply particularly to small jurisdictions.

Mulitalo notes that it is difficult for drafters in the South Pacific to abide by the fundamental principle that drafters translate policy into law and do not make policy as if this principle were to be followed, there would hardly be any laws tabled before Parliament for debate. She notes that due to the challenge of receiving incomplete policy instructions for a draft Bill, in Samoa as in most countries in the South Pacific, the few drafters are at times requested to develop policy.<sup>117</sup>

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<sup>113</sup> No. 1 above, pp. 20 – 21.

<sup>114</sup> No. 95 above.

<sup>115</sup> No. 24 above.

<sup>116</sup> No. 15 above.

<sup>117</sup> No. 23 above.

A similar view is expressed by Perera. She notes that due to poorly drafted Cabinet Memoranda, policy documents and drafting instructions, the drafter, after fruitless efforts to sieve out the main requirements in a policy paper, is forced to proceed to write the legislation in a coherent form by filling in the gaps to the best of his ability and afterwards to invite the instructing officials to verify whether the draft meets the required policy objectives. She notes that more often than not, the officials are delighted since the draft looks good and contains much more details than they had envisaged which implies their satisfaction with the drafter for having stepped into their shoes and having extracted the policy for them and subsequently writing the legislation on the basis of such a policy.<sup>118</sup> This situation shows a high level of involvement of the drafter in policy.

Cain refers to a similar view of the drafter taking over policy in a small jurisdiction. In referring to the writing of Edmund Lenfestey, a drafter in a small jurisdiction, Cain notes that it is not unusual for the draftsman in a mini-state to be presented with a policy vacuum and to be expected to fill it. He notes that the drafter will thus become the author or co-author of the policy to be implemented by legislation that the drafter himself will be drafting and that his influence can therefore be of crucial importance.<sup>119</sup> This shows the drafter's high level of involvement in policy in a small jurisdiction.

In Ghana, an interview with Mr. Tackey reveals that the view of the drafter having to take over policy from policy makers is extreme and does not apply. He states that where there are gaps in the policy, the

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<sup>118</sup> Therese Perera, "*The Wavering Line between Policy Development and Legislative Drafting*", Loophole-August 2011, p. 67-68, [www.opc.gov.au/calc/loophole.htm](http://www.opc.gov.au/calc/loophole.htm) (accessed September 20, 2013).

<sup>119</sup> T. W. Cain, "*The Legislative Draftsman in a Small Jurisdiction*", 11 Statute L. Rev. 77 1990, p. 79, HeinOnline, <http://heinonline.org>, (accessed April 25, 2014).

drafter draws the attention of the instructing officials to those gaps and suggests alternatives to fill in the gaps. The drafter, as a general rule, does not proceed to fill in the gaps himself and to subsequently seek verification of his proposal from instructing officials as this will be perceived as interfering with policy and attempting to take over policy from instructing officials.<sup>120</sup> This view of the drafter not taking over policy from the policy maker is confirmed through an interview with an instructing official, Mr. Samuel Thompson Essel. He states that in his experience of developing anti-money laundering and counter-financing of terrorism legislation with the Legislative Drafting Division, the drafter only drew his attention and that of other instructing officials to gaps in the policy and at best suggested alternatives to fill in the gaps. According to him, at no point did the drafter seek to take over the policy.<sup>121</sup>

This shows that the drafter in Ghana, as a public servant, in answerable to the Executive and cannot seek to take over policy from the Executive, which is seen as the preserve of the Government.

#### **4.4 Is there a middle ground?**

Thornton however opines that neither of the two extreme views of a drafter having no involvement in policy or taking over policy from the policy makers is sustainable and that the drafter's role lies somewhere in between the two extreme views. According to Thornton, drafters are not and should not be primarily responsible for the development of policy although they do have important responsibilities in that area. He states that the drafter should not be expected to take over the role of the policy maker by

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<sup>120</sup> No. 31 above.

<sup>121</sup> Interview with Mr. Samuel Thompson Essel, Chief Executive Officer of the Financial Intelligence Centre, Ghana, 25/06/2014. He has been instrumental in the development of the Anti-Money Laundering Act, 2008 (Act 749) and its amending legislation; the Anti-Terrorism Act, 2008 (Act 762) and its amending legislation; the Anti-Money Laundering Regulations, 2011 . (L.I. 1987) and the Anti-Terrorism Regulations, 2012 (L.I. 2181), among others.

developing incomplete policy and working out the details of how the policy is to be implemented, while noting that although they are not primarily responsible for policy, drafters have important advisory responsibilities of a policy kind.<sup>122</sup> This view seems to suggest that there is a middle ground between the two extreme views.

#### **4.4.1 A fine line between policy development and legislative drafting**

This view of a middle ground between the two extreme views of a drafter's role with respect to policy is shared by other authors who make reference to there being a fine or thin line between the two extreme views of a drafter having no involvement in policy or a drafter taking over policy from the policy makers. Bowman notes that although the drafter is not required to make up policy, it is part of his job to offer workable solutions where possible and that the line between offering workable solutions on the one hand and making up the policy on the other hand is often a fine one and a great deal of experience is required to judge where it lies in a given case.<sup>123</sup>

Similarly, Macnair notes that although the drafter does not play an active part in the policy process and plays a role of merely suggesting or explaining, this is a fine line to draw and requires a difficult balancing act.<sup>124</sup> Driedger also makes a reference to this line between the two extreme views. He notes that although the draftsman is not required to originate or determine policy, the dividing line between policy and law, between form and substance, is not a sharp one and the draftsman cannot escape being involved

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<sup>122</sup> No. 15 above.

<sup>123</sup> No. 97 above.

<sup>124</sup> Deborah Macnair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective", *Statute Law Rev.* (2003) 24 (2): 125, p. 130, <https://studyonline.sas.ac.uk> (accessed April 30, 2012).

in policy discussions.<sup>125</sup> Crabbe, for his part, refers to the task of appreciating the thin line that divides legal assistance from officious meddling.<sup>126</sup>

The line between the two extreme views of a drafter having no involvement in policy or a drafter taking over policy from the policy makers has also been described as wavering or non-existent. Grant notes that in the transformation of government policy into law, the line is drawn in the sense that the drafter is not to decide what the law should be, and yet the line wavers.<sup>127</sup> Similarly, Perera notes that the act of drafters filling in the gaps in policy developed by instructing officials makes the wavering line between policy development and legislative drafting become more and more indistinguishable and almost non-existent in certain cases.<sup>128</sup>

The references above to a fine, thin line between the two extreme views of a drafter having no involvement in policy or a drafter taking over policy from the policy makers, a line which wavers and borders on being non-existent are seen to suggest that neither of the two extreme views is sustainable, as opined by Thornton.<sup>129</sup> This implies that there may be a middle ground between the two opposing views, that is, the drafter need not necessarily steer clear of policy by having no role whatsoever to play in policy development and neither should the drafter completely take over policy from the policy maker or instructing official. Various authors are seen to adopt this stance.

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<sup>125</sup> No. 21 above.

<sup>126</sup> No. 13 above, p. 23.

<sup>127</sup> No. 107 above.

<sup>128</sup> No. 118 above, p. 68.

<sup>129</sup> No. 15 above.

#### 4.4.2 Role of legislative drafter in policy development

Leveret notes that although drafters are not policy developers there will always be room for at least some policy work to be done by drafters, such as challenging policy assumptions or fleshing out incomplete policies.<sup>130</sup> Similarly, it has been stated that although in broad terms the drafter is responsible for the way that legislation is expressed while responsibility for policy lies with the department, in practice, policy and drafting are not mutually exclusive but form a continuum.<sup>131</sup>

Similarly, Bowman notes that although ultimately the basic policy is for others and is for Ministers in the final analysis, it is a definite part of the drafter's job to point out any traps inherent in the policy and where possible to offer solutions.<sup>132</sup> In expressing a similar view, Page, in describing the work of the Office of Parliamentary Counsel, notes that although counsel do not seek to impose or insinuate their own policy preferences during the process, counsel can and occasionally do give advice to Ministers when they are considering the political case for legislation and in the drafting process they occasionally point out potential dangers that could unravel the legislation especially through hostile amendments.<sup>133</sup>

Nampoothiry, in supporting this theory of a middle ground, notes that while the draftsperson should not take on the policy maker's role, there is a duty to help the policy maker to shape the policy and to

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<sup>130</sup> No. 66 above, p. 31.

<sup>131</sup> Guide to Working with the Parliamentary Counsel Office, Edition 3.3.2, September 2011, Parliamentary Counsel Office, Wellington, New Zealand, p. 12, <https://studyonline.sas.ac.uk>, (accessed April 30, 2013).

<sup>132</sup> No. 39 above.

<sup>133</sup> No. 82 above, pp. 9-11.

identify gaps where adequate instructions are lacking.<sup>134</sup> Biribonwoha proposes that the drafter's involvement in policy-making should not be of a primary nature but should be to tap into the possible benefits that the drafter can bring to the process.<sup>135</sup> Crabbe posits that although the drafter is not primarily concerned with policy matters, the drafter is in a position to advise on policy as by virtue of his expertise and independence, much can be achieved especially when he has to point out the implications and the dangers inherent in a particular policy proposal.<sup>136</sup> Similarly, Dickerson notes that although the draftsman does not make substantive policy, the drafter's advice on policy is often earnestly sought and properly given. He notes that the practical problem is to discharge this duty without encroaching on the client's prerogatives.<sup>137</sup>

Cain also acknowledges this role of a drafter which lies between not having any involvement in policy development and taking over policy development from policy-makers. In quoting a comment made by J. Q. Ewans, Cain notes that although a draftsman should not be concerned directly with policy such as preparing plans or schemes of legislation, a draftsman may help with legal matters such as the appropriate penalties for offences although the draftsman may prefer that they be decided by policy makers in the law department.<sup>138</sup> This view is seen to apply in Ghana. In Ghana, an interview with Miss Quartey Papafio reveals that whenever policy advice is asked for by the instructing officials such as the penalty required for an offence in terms of the fine to be paid or the term of imprisonment required, the Legislative Drafting

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<sup>134</sup> No. 98 above, p. 59.

<sup>135</sup> Pius Perry Biribonwoha, *"The Role of Legislative Drafting in the Law Reform Process"*, Commonwealth Law Bulletin Vol. 32, No. 4, December 2006, p. 608, HeinOnline, <http://heinonline.org> (accessed May 16, 2014).

<sup>136</sup> No. 1 above, pp. 23-24.

<sup>137</sup> No. 95 above, p. 10.

<sup>138</sup> No. 119 above, p. 81.

Division provides the instructing officials with a Fines and Penalty Units Table<sup>139</sup> which provides various fines in terms of penalty units with their corresponding terms of imprisonment. This serves to inform the instructing officials of what penalty is applicable in terms of the offence created. The drafter does not decide on the penalty to be provided as to do so will result in the drafter dictating policy to the Executive. At best, the drafter may refer the instructing official to similar legislation in order for the instructing official to arrive at an informed opinion.<sup>140</sup>

#### **4.4.3 To what extent should the legislative drafter be involved in policy?**

In attempting to determine the role of a drafter with respect to policy, Hodge, Cowan and Hurford pose the question of to what extent the drafter should cross the line between writing the law and influencing the content of the law. They note that objectivity is a vital quality in producing good and effective legislation so that becoming an advocate or an opponent of policy is likely to impede the development of good drafting.<sup>141</sup> A similar view of the drafter being neutral is expressed by the Office of the Parliamentary Counsel. It is noted that regarding the role of counsel in relation to policy-making, the default position of the Office of Parliamentary Counsel team is one of cautious detachment. It is however stated that in their normal default role, counsel will often be able to make a significant contribution to policy-making such as drawing attention to a proposal that is likely to attract particular difficulties either in Parliament or the courts.<sup>142</sup>

Hodge, Cowan and Hurford also question whether a drafter should merely point out deficiencies in

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<sup>139</sup> Appendix 3 – Fines and Penalty Units Table.

<sup>140</sup> No. 59 above.

<sup>141</sup> No. 14 above, pp. 5-6.

<sup>142</sup> Office of Parliamentary Counsel: Working with Parliamentary Counsel, 26 January 2011, p.16, [www.dpm.cabinetoffice.gov.uk/sites/default/files/resources/working-with-parliamentary-counsel.pdf](http://www.dpm.cabinetoffice.gov.uk/sites/default/files/resources/working-with-parliamentary-counsel.pdf), (accessed October 22, 2012).

a proposed scheme or conflicts with other laws and wait for the instructor to resolve them. They question whether the drafter is moving outside his role as a neutral interpreter or facilitator of policy if he goes further to offer solutions and whether it is ethical to add content to policy even in this helpful way. They conclude that to the extent that a drafter is merely facilitating policy objectives clearly agreed to by Cabinet, there appears to be no reasonable objection to a drafter influencing content by adding or suggesting improvements to a proposed legislative scheme. According to the authors, such suggestions need not be accepted by the instructing agency and should not be forced on the agency.<sup>143</sup>

In Ghana, an interview with Mr. Tackey reveals that although the drafter may be facilitating policy objectives clearly agreed to by Cabinet as stated by Hodge, Cowan and Hurford above<sup>144</sup>, the drafter only goes as far as suggesting alternatives and waits for the instructing officer to confirm if the suggestion is appropriate. He states that the drafter does not, of his own accord, make any addition to the policy. It is only upon confirmation from the instructing agency that the drafter adds the suggestion made to the legislation and not before. The drafter acts this way in order not to be seen as interfering with the policy objectives of the Government.<sup>145</sup> Thus the view of Hodge, Cowan and Hurford of there being no reasonable objection to a drafter influencing content by adding improvements to a proposed legislative scheme is seen not to apply in Ghana.

Hodge, Cowan and Hurford conclude that perhaps, the ethical balance is best reached by leaving the decision-making about drafting content changes to the instructing agency even if the drafter disagrees

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<sup>143</sup> No. 14 above, p. 6.

<sup>144</sup> Ibid.

<sup>145</sup> No. 31 above.

with the agency's decision.<sup>146</sup> Other authors share this view. Dickerson refers to Middleton Beaman who in emphasizing the vicarious position of the draftsman, describes the draftsman as an "intellectual eunuch". According to Dickerson, the draftsman must also be an "emotional oyster". He notes that however deeply the draftsman may feel about the wisdom of the policy he is called upon to express, he must submerge his own feelings and act with scrupulous objectivity. Dickerson states that within the bounds of legality and professional morality, the draftsman should strive to carry out his client's purpose even when he strongly disagrees with it.<sup>147</sup> Similarly, Driedger notes that the drafter does not have the last word on the form or content of an Act; he only puts on paper what someone else desires. He notes that the drafter is accountable to the Minister in charge or the Cabinet and the drafter amends or re-drafts the Bill accordingly, upon their request.<sup>148</sup> In referring to the drafter not having the last word, Quiggin notes that although the drafter plays a collaborative role and works with the instructing area to analyze policy, the choice between one legislative option and another lies with the policy area.<sup>149</sup> Similarly, Purdy notes that although the drafter may initiate the discussion of alternatives, except in unusual circumstances, the drafter should ultimately defer to the legislator's prerogative.<sup>150</sup>

However, Hodge, Cowan and Hurford criticize this disinterested stance of the drafter in relation to the development of policy. They refute the description of a drafter as an "intellectual eunuch" or an

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<sup>146</sup> No. 14 above, p. 6.

<sup>147</sup> No. 95 above, pp. 10-11.

<sup>148</sup> No. 21 above, p. xx.

<sup>149</sup> No. 9 above.

<sup>150</sup> Roger Purdy, "Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems", 11 Seton Hall Legis. J. 67 1987 – 1988, p. 84, HeinOnline, <http://heinonline.org>, (accessed April 29, 2014).

“emotional oyster” as described by the commentators above and rather opine that the drafter brings his own life experience, opinions and values to the drafting process which shapes the drafter’s approach to particular issues and influences the questions asked by the drafter about particular matters. They refer to Marcello who opines that drafting decisions are often influenced consciously or unconsciously by the advocacy agenda of the individual drafter. They therefore advise drafters to be aware of this trend when making decisions about the policy or intent of proposed legislation.<sup>151</sup>

#### **4.4.4 Examples of the nature of the involvement of the legislative drafter in policy**

In Ghana, the drafter rather adopts this disinterested stance referred to by Hodge, Cowan and Hurford and leaves the decision-making about policy to the Executive. The drafter only goes as far as suggesting alternatives to the instructing agency and waits for the confirmation of those suggestions by the instructing agency before incorporating the suggestions. The drafter does not of his own accord; add content to policy which will be tantamount to dictating policy. This is seen from the following examples gained from interviews with drafters and instructing officials specified below.

The following example is gained from interviews with Mr. Henry Tackey<sup>152</sup> and Dr. Kofi Mbiah.<sup>153</sup> In the preparation of the Ghana Shippers Authority Regulations, 2012 (L.I. 2190) various stakeholders, including the Ghana Maritime Authority, expressed dissatisfaction with the Regulations at a meeting of the Parliamentary Committee on Subsidiary Legislation to consider the Regulations before the Regulations

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<sup>151</sup> No. 14 above, p. 7.

<sup>152</sup> No. 31 above.

<sup>153</sup> Interview with Dr. Kofi Mbiah, Chief Executive Officer of the Ghana Shippers Authority, 22/05/2014.

were formally laid in Parliament. It was not clear whether in the Regulations there was a duplication of the mandate of the Ghana Maritime Authority set up under the Ghana Maritime Authority Act, 2002 (Act 630) by the Ghana Shippers Authority set up under the Ghana Shippers Authority Act, 1974 (N.R.C.D. 254). According to Mr. Tackey,<sup>154</sup> for purposes of clarity and in order to avoid the perceived duplication of the functions of the Ghana Maritime Authority by the Ghana Shippers Authority, the Legislative Drafting Division suggested to the Ministry of Transport and the Ghana Shippers Authority that there should be a purpose provision in the Ghana Shippers Authority Regulations to indicate the purpose of the Regulations.<sup>155</sup> According to Dr. Mbiah, the suggestion of a purpose provision by the Division was subsequently accepted by the Ghana Shippers Authority which then instructed the Division to proceed with the incorporation.<sup>156</sup> Mr. Tackey states that the Division, upon the directives of the Authority then incorporated the purpose provision into the Regulations after which the Regulations were subsequently laid in Parliament.<sup>157</sup> This example shows how the drafter only goes as far as suggesting an improvement in a draft legislation to the instructing agency, rather than going ahead and incorporating the suggested improvement to the draft legislation and seeking a confirmation from the instructing agency of the action taken.

Another example which shows the nature of the involvement of the drafter in policy can be seen in the preparation of the Tourism Act, 2011 (Act 817). This example is gained from interviews with Mrs. Appiah<sup>158</sup> and Dr. Joel Sonne<sup>159</sup>. The Tourism Bill which was published in the *Gazette* on the 24<sup>th</sup> of

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<sup>154</sup> No. 31 above.

<sup>155</sup> Appendix 5 – Clause 54 of the Tourism Bill, 2010.

<sup>156</sup> No. 153 above.

<sup>157</sup> No. 31 above.

<sup>158</sup> No. 37 above.

September, 2010 had a provision, namely clause 54, on sex tourism.<sup>160</sup> This clause prohibited sex tourism and provided for an additional penalty for it in addition to the penalty provided for a sexual offence under the Criminal Offences Act, 1960 (Act 29). According to Mrs. Appiah, the Legislative Drafting Division advised the then Ministry of Tourism that the provision should be deleted as the provision was in conflict with the principle of double jeopardy since the penalty for the offence of sex tourism was to be in addition to any penalty for a sexual offence under Act 29. Since Act 29 already provided penalties for sexual offences, it was not necessary to have a separate offence of sex tourism with a corresponding penalty in the Tourism Bill which would be in addition to a penalty for the sexual offence under Act 29. She states that the Ministry of Tourism gave its approval and the provision was subsequently deleted from the Bill during the deliberation on the Bill by the Parliamentary Select Committee on Tourism and Culture.<sup>161</sup> This is confirmed by Dr. Sonne.<sup>162</sup> This example also shows the nature of the drafter's involvement in policy and how the drafter only makes a suggestion of an improvement in policy to the policy maker, rather than going ahead with his suggested proposal and seeking confirmation of his action from the policy maker or seeking to impose his will on the policy maker.

Another example of the drafter's role in policy is seen in the preparation of the National Petroleum Authority (Prescribed Petroleum Pricing Formula) Regulations, 2012 (L.I. 2186). This example is gained from interviews with Mr. Tackey<sup>163</sup> and Miss Louisa Quaicoe.<sup>164</sup> According to Mr. Tackey, the draft

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<sup>159</sup> Interview with Dr. Joel Sonne, Director for Projects, Ministry of Tourism, Culture and Creative Arts, 30/06/14.

<sup>160</sup> Appendix 5 – Clause 54 of the Tourism Bill, 2010.

<sup>161</sup> No. 37 above.

<sup>162</sup> No. 159 above.

<sup>163</sup> No. 31 above.

Regulations received by the Legislative Drafting Division as drafting instructions included definitions of some words which had already been defined in the parent Act being the National Petroleum Authority Act, 2005 (Act 691). The Legislative Drafting Division advised the National Petroleum Authority of the need to omit the words and their definitions from the provision on interpretation in accordance with section 37 (1) (a) of the Interpretation Act, 2009 (Act 792) which provides that where an enactment confers a power to make a statutory instrument or to issue a statutory document, expressions used in the statutory instrument or the statutory document have the same respective meaning as in the enactment, unless the contrary intention appears. Since the words had already been defined in Act 691, it was not necessary for the Regulations to repeat the definitions of the words.<sup>165</sup> The Authority accepted the suggestion and the Division subsequently omitted those words and their definitions from the Regulations. This is confirmed by Miss Quaicoe.<sup>166</sup> Mr. Tackey states that the Division also pointed out to the Authority that in the provision on interpretation in the Regulations, certain words had been given a different definition from what pertained in Act 691 which contravened the *ultra vires* principle as provisions in the Regulations should not be contrary to what is provided in the Act.<sup>167</sup> The Authority, according to Miss Quaicoe, agreed to the omission of those words from the Regulations and the Division subsequently omitted those words and their definitions from the Regulations.<sup>168</sup> This shows the nature of the drafter's involvement in policy.

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<sup>164</sup> Interview with Miss Louisa Quaicoe, formerly a legal officer at the National Petroleum Authority, 27/06/14. She was the instructing official responsible for the Regulations.

<sup>165</sup> No. 31 above.

<sup>166</sup> No. 164 above.

<sup>167</sup> No. 31 above.

<sup>168</sup> No. 164 above.

#### **4.5 Summary of Chapter 4**

This Chapter has discussed the constraints on the legislative drafter's involvement in policy by examining two extreme views on the role of drafters with respect to policy as either having no role whatsoever in the development of policy or as taking over the development of policy from the policy makers. It is noted that while neither of the two extreme views hold, there exists a middle ground between the two extremes whereby the drafter plays a collaborative role and makes suggestions on policy proposals to the Executive without seeking to impose his will on the Executive. Examples of the drafter's role in policy development in Ghana are given which show that the drafter only advises and does not impose his will on the instructing official as policy is the preserve of Government.

## CHAPTER 5: CONCLUSION

This dissertation has attempted to prove that in the transformation of government policy into law, although the legislative drafter is involved in policy, there are constraints on this involvement to the extent that policy is the preserve of the Government. In seeking to prove this hypothesis, the case in Ghana is examined.

The drafter's role in different stages of the policy process described by Hague and Harrop<sup>169</sup> is discussed. It is noted that in Ghana, the drafter's input is greatest in the formulation stage, the legislative process and the evaluation stage with there being no involvement of the drafter in the implementation and the decision stage as these stages are reserved for policy makers. This shows that despite the drafter's involvement in policy as shown in his involvement in some stages of the policy process, there are constraints on this involvement as policy is the preserve of the Government.

This dissertation also discusses how the nature of the drafter's role and function determines the extent of the drafter's involvement in policy which in turn shows the constraints on the drafter's involvement in policy to the extent that policy is the preserve of the Government. It is noted that where the drafter plays the role of a translator, the drafter has a low level of involvement in policy as he merely translates the policy into law which shows a major constraint on his involvement in policy. As a guardian of legality, the drafter is seen not to be concerned with policy decisions but to focus on guarding the statute book. As an integrating professional and in performing the function of a composer, the drafter is seen to be highly involved in policy

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<sup>169</sup> No. 10 above.

although there are constraints on his involvement as the drafter cannot make policy decisions since policy is the preserve of the Government. It is noted that in Ghana the drafter plays the role of an integrating professional and performs the function of a composer.

Despite the drafter's involvement in policy, there are seen to be constraints on this involvement to the extent that policy is the preserve of the Government. In answering the question posed by Hodge, Cowan and Hurford of to what extent a drafter should cross the line between writing the law and influencing its content<sup>170</sup>, this dissertation examines two extreme views referred to by Thornton of the drafter either having no role whatsoever in the development of policy or of the drafter taking over the development of policy from the policy maker. It is noted that a middle ground between the two extreme views is optimal and is what pertains in Ghana. References to a fine line between policy development and legislative drafting are discussed. The role of the drafter in policy development and the extent to which a drafter should be involved in policy are also examined. Examples are given to show the nature of the drafter's involvement in policy in Ghana whereby it can be seen that the drafter only goes as far as suggesting alternatives to the policy makers where necessary and only takes action upon confirmation by the instructing official of the proposed alternative, showing that the drafter does not dictate policy.

The above discussion shows therefore that that in the transformation of government policy into law, although the legislative drafter is involved in policy, there are constraints on this involvement to the extent that policy is the preserve of the Government.

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<sup>170</sup> No. 14 above.

## APPENDICES

### APPENDIX A

#### Article 106 of the 1992 Constitution of the Republic of Ghana

##### Mode of exercising legislative power

106. (1) The power of Parliament to make laws shall be exercised by bills passed by parliament and assented to by the President.

(2) No bill, other than such a bill as is referred to in paragraph (a) of article 108 of this Constitution, shall be introduced in parliament unless -

(a) it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction; and

(b) it has been published in the Gazette at least fourteen days before the date of its introduction in Parliament.

(3) A bill affecting the institution of chieftaincy shall not be introduced in Parliament without prior reference to the National House of Chiefs.

(4) Whenever a bill is read the first time in Parliament, it shall be referred to the appropriate committee appointed under article 103 of this Constitution which shall examine the bill in detail and make all such inquiries in relation to it as the committee considers expedient or necessary.

(5) Where a bill has been deliberated upon by the appropriate committee, it shall be reported to Parliament.

(6) The report of the committee, together with the explanatory memorandum to the bill, shall form the basis for a full debate on the bill for its passage, with or without amendments, or its rejection, by Parliament.

(7) Where a bill passed by Parliament is presented to the President for assent he shall signify, within seven days after the refuses to assent to the bill, unless the bill has been referred by the President to the Council of State under article 90 of this Constitution.

(8) Where the President refuses to assent to a bill, he shall, within fourteen days after the refusal -

(a) state in a memorandum to the Speaker any specific provisions of the bill which in his opinion should be reconsidered by Parliament, including his recommendations for amendments if any; or

(b) inform the Speaker that he has referred the bill to the Council of State for consideration and comment under article 90 of this Constitution.

(9) Parliament shall reconsider a bill taking into account the comments made by the President or the Council of State, as the case may be, under clause (8) of this article.

(10) Where a bill reconsidered under clause (9) of this article is passed by Parliament by a resolution supported by the votes of not less than two-thirds of all the members of Parliament, the President shall assent to it within thirty days after passing of the resolution.

(11) Without prejudice to the power of Parliament to postpone the operation of a law, a bill shall not become law until it has been duly passed and assented to in accordance with the provisions of this Constitution and shall not come into force unless it has been published in the *Gazette*.

(12) The provisions of clauses (7) to (10) of this article shall not apply to a bill certified by the Speaker as a bill to which the provisions of article 108 of this Constitution apply; and accordingly, the President shall give his assent to any such bill when presented for assent.

(13) Where it is determined by a committee of Parliament appointed for the purpose that a particular bill is of an urgent nature, the provisions of the preceding clauses of this article, other than clause (1) and paragraph (a) of clause (2) shall not apply, and accordingly, the President shall give his assent to the bill on its presentation for assent.

(14) A bill introduced in Parliament by or on behalf of the President shall not be delayed for more than three months in any committee of Parliament.

## APPENDIX B

### Orders 122 to 135 of the Standing Orders of the Parliament of the Republic of Ghana

#### **First reading of bills**

**122.** When the time for presenting Bills arrives Mr. Speaker shall call successively each Member or Minister in whose name a Bill stands on the Order Paper. The Member or Minister so called shall rise in his place and bow to the Chair, whereupon the Clerk shall read aloud the long Title of the Bill which shall then be considered as read the First Time.

#### **Gazette Publication of Bills**

**123.** Where the Bill under Order 118 (Urgent Bills) or under 121 (Bills Regarding Settlement of Financial Matters), has been read the First Time without prior publication in the *Gazette* it shall be so published within twenty-four hours or as soon as practicable after that.

#### **Reference of Bills to Committee (cf. article 106 (4) of the Constitution)**

**124.** Whenever a Bill is read the First Time in the House, it shall be referred to the appropriate Committee appointed under the provisions of article 103 of the Constitution which shall examine the Bill in detail and make all such inquiries in relation to it as the Committee considers expedient or necessary.

#### **Report on Bills**

**125.** When a Bill has been deliberated upon by the appropriate Committee, that Committee shall submit a report on it to the House.

#### **Second Reading of Bills**

**126.** (1) On a motion being made that a Bill be now read a Second Time, a full debate shall arise on the principle of the Bill on the basis of the explanatory memorandum and the report from the committee.

(2) If the motion is carried the Clerk shall read aloud the Long Title of the Bill, which shall then be considered as read the Second Time.

#### **Winnowing Process**

**127.** *Where after a Bill has been read a second time more than Twenty (20) amendments are proposed to it, any Member proposing an amendment may appear before the Committee dealing with the subject-matter to defend his amendment(s) and the Committee shall submit a report to the House on the result of this exercise before the consideration stage of the Bill is taken.*

#### **Consideration Stage of Bills**

**128.** (1) When a Bill has been read a Second Time and after a winnowing process, where necessary, it shall pass through a Consideration Stage in the House which shall not be taken until at least forty eight hours have elapsed (this period not including days on which the House does not sit).

(2) At the Consideration Stage of a Bill the House shall not discuss the principle of the Bill but only its details.

(3) At the Consideration Stage of a Bill the Mace shall stand tilted before the Table and a Member may

Speak more than once to any Question proposed.

(4) At the Consideration Stage of a Bill the House may make such amendments as it considers fit, provided that the amendments (including new clauses and new schedules) comply with the following conditions:

- (a) they must be relevant to the subject-matter of the clause to which they relate;
- (b) they must not be inconsistent with any clause already agreed to or any decision already come to by the House;
- (c) If they refer to, or are not intelligible without a subsequent amendment, notice of the subsequent amendment, unless Mr. Speaker permits otherwise, must be given before or when the first amendment is moved, so as to make the series of amendments intelligible;
- (d) if an amendment is not within the Long Title of the Bill, the Long Title shall be amended accordingly;
- (e) the provisions of Order 81 (Method of Putting the Question on Amendments) shall apply to the discussions of amendments to Bills, with the substitution, where appropriate, of the word "clause" for the word "question", and any amendments proposed to an amendment shall be dealt with before a decision is taken on the original amendment.

### **Procedure at Consideration Stage of Bills**

**129.** At the Consideration Stage of a Bill—

- (a) Mr. Speaker shall call the number of each clause and the Clerk shall read the marginal note opposite to each clause or notes on top of each clause, and if no amendment is offered Mr. Speaker shall, after each clause has been called, put the question "That clause..... stand part of the Bill";
- (b) If any Member announces, while a clause is being called, that he wishes to move an amendment to, or make some comment on the clause, Mr. Speaker shall not put the question with regard to the clause which has been called but not yet agreed to, which shall then be considered;
- (c) where an amendment appears on the Order Paper and exceeds four lines it shall not be necessary for the Member moving it or Mr. Speaker in putting it to read out the amendment, provided that the place in the Order Paper where it appears is pointed out;
- (d) after the clause has been so considered and after any proposed amendment to it has been agreed to or negatived, Mr. Speaker shall put the question "That clause ..... (Or clause ..... as amended) stand part of the Bill";
- (e) the consideration of the Schedule (or Schedules) (if any) and the Long Title shall follow the consideration of the clauses, including new clauses, and the procedure prescribed

in this Order shall, with the necessary modifications, be followed;

- (f) a clause in the Bill as printed may be postponed, unless upon an amendment to it a question has been fully put from the Chair;
- (g) such postponed clauses shall be considered after the remaining clauses of the Bill and before any new clauses which may have been deferred for consideration have been brought up;
- (h) new clauses may be considered at their appropriate places in the Bill, or they may be deferred for consideration until after the clauses in the Bill as printed have been disposed of;
- (i) on the title of any new clause being read by the Clerk, the clause shall be taken to have been read the First Time. The question shall then be proposed "That the clause be read a second time," and if it is agreed to, amendments may then be proposed to the new clause. The final question to be proposed shall be "That the clause (or the clause as amended) be added to the Bill";
- (j) new schedules shall be considered and treated in the same way as new clauses;
- (k) when a new clause or schedule has been agreed to by the House or amended and agreed to, it shall not be competent for the House to resume consideration of them.

### ***Disposal of Outstanding Matters at the Appointed Hour***

**130.** *At the appointed hour in accordance with the allocation of Time Order for the completion of a particular stage of a Bill or business, Mr. Speaker shall forthwith put every question necessary to dispose of all the outstanding matters in connection with that stage of the bill or other business.*

### **Amendment of bills after Consideration Stage**

**131.** (1) If any Member desires to delete or amend a provision contained in a Bill which has passed through the Consideration Stage, or to introduce any new provision to it, he may, at any time before a Member rises to move the Third Reading of the Bill, move that the Bill do pass through a second Consideration Stage (either wholly or in respect only of some particular part or parts of the Bill or some proposed new clause or new schedule). No notice of such motion shall be required. If the motion is agreed to, the Bill shall immediately pass through a second Consideration Stage.

(2) When the whole of a Bill has been ordered to pass through a second Consideration Stage, the House shall go through the Bill in the manner provided in Order 129 (procedure at Consideration Stage of Bills).

(3) When a Bill has been ordered to pass through a second Consideration stage in respect only of some particular part or parts or some proposed new clause or new schedule, the House shall consider only the relevant provisions and any amendment which may be proposed to it.

### **Third reading of bills**

**132.** (1) When a Bill has passed through the Consideration Stage, the Third Reading shall not be taken until at least twenty-four hours have elapsed (this period not including days on which the House does not sit).

(2) Upon a motion "That the .... Bill be now read the Third Time," it shall be competent for any Member to move an amendment to delete the words "read the Third Time" and to insert the word "rejected," or to move a "reasoned" amendment, stating the object and motive on which the opposition to the Bill is based, but such words must be strictly relevant to the Bill and not deal with its details.

(3) If the motion for the Third Reading is agreed to, the Clerk shall read aloud the Long Title of the Bill, which shall then be taken as read the Third time and passed.

(4) A motion for the Third Reading of a Bill shall not be made on the same day as the Second Reading, except as provided in Order 118 (Urgent Bills).

### **Withdrawal of bills**

**133.** Either before the commencement of public business or at the commencement of any stage of a Bill, the Member in charge of the Bill may make a motion without notice for its withdrawal.

### **Passing of bills**

**134.** No Bill shall be deemed to have been passed by the House unless it has been read three times and has passed through the Consideration State.

### **Presidential assent (cf. article 106 (7) to (10) of the Constitution) and Consideration by the Council of State.**

**135.** (1) Every Bill passed by Parliament shall be presented to the President for assent. The President shall signify within seven days to Mr. Speaker whether he assents to the Bill or refuses to give assent unless the Council of State indicates that it is considering the Bill.

(2) Where the President refuses to assent to a Bill he shall, within fourteen days of the refusal,

(a) state in a memorandum to the Speaker any specific provisions of the Bill which in his opinion should be reconsidered by Parliament including his recommendations for amendments; or

(b) inform Mr. Speaker that he has referred the Bill to the Council of State for consideration and comments or that the Council is considering the Bill.

(3) Parliament shall reconsider such a Bill taking into account the comments made by the President or the Council, as the case may be, under paragraph (2) of this Order.

(4) Where a Bill reconsidered under the preceding paragraph is passed by Parliament by a resolution in that behalf supported by the votes of not less than two-thirds of all the Members of Parliament, the President shall assent to the Bill within thirty days of the passing of the resolution.

(5) Without prejudice to the power of Parliament to postpone the operation of a law, a Bill shall not become law until it has been duly passed and assented to in accordance with the provisions of the

Constitution and shall not come into force unless it has been published in the *Gazette*.

## APPENDIX C

IMPOSITION OF FINES BY PENALTY UNIT UNDER THE FINES (PENALTY UNITS) ACT, 2000  
(ACT 572) AS AFFECTED BY THE FINES (PENALTY UNITS)(AMDT) INSTRUMENTS, 2005  
(L.I.1813) ONE PENALTY UNIT=GH¢12

PENALTY UNIT	MAXIMUM DURATION OF IMPRISONMENT	FINE EQUIVALENT IN NEW GH¢
1 penalty unit	-	12.00
2.5 penalty units	-	30.00
5 penalty units	7 days	60.00
10 penalty units	14 days	120.00
15 penalty units	-	180.00
25 penalty units	30 days	300.00
50 penalty units	3 months	600.00
100 penalty units	6 months	1,200.00
150 penalty units	12 months	1,800.00
200 penalty units	15 months	2,400.00
250 penalty units	2 years	3,000.00
500 penalty units	-	6,000.00
750 penalty units	-	9,000.00
1000 penalty units	4 years	12,000.00
1,250 penalty units	-	15,000.00
1,500 penalty units	-	18,000.00
not exceeding 2,000 penalty units	-	24,000.00
not exceeding 2,500 penalty units	5 years	30,000.00
not exceeding 2,750 penalty units	-	36,000.00
not exceeding 3,500 penalty units	7 years	42,000.00
not exceeding 4,000 penalty units	-	48,000.00
not exceeding 4,500 penalty units	-	54,000.00
not exceeding 5,000 penalty units	10 years	60,000.00

\* Regulation 9 of the Statutory Instruments Act, 1959 (No.52) of 1959 as amended by the Statutory Instruments (Amendment) Act, 2007 (Act 742) prescribes that the maximum penalty for an offence committed under a statutory instrument should not exceed one hundred and fifty penalty units or imprisonment for a term of one year or both and in the case of a continuing offence an additional penalty of not more than five penalty units for each day on which the offence continues.

1959) were repealed by section 52 of the Interpretation Act, 2009 (Act 792). Section 26 of the Interpretation Act, 2009 (Act 792) however saves the provision for expressing fines as penalty units. Section 27 of Act 792 provides for the pecuniary value of a penalty unit to be equivalent to the amount of cedis specified in the Second Schedule to Act 792 which is GHC 12.00. The Attorney-General is given the power to amend the Schedule by legislative instrument.

## APPENDIX D

### Regulation 1 of the Ghana Shippers' Authority Regulations, 2012

#### Purpose

1. The purpose of these Regulations is to provide
  - (a) for consultation between the Authority and shipping service providers who operate along the logistics chain in the transport industry in respect of international trade,
  - (b) for the negotiation of
    - (i) charges in relation to shipment and clearance of cargo from a port,
    - (ii) minimum standards and quality of shipping services to be rendered to shippers, and
    - (iii) any other related matters; and
  - (c) information to shippers in Ghana through the use of advanced shipment information,

with the aim to protect and represent the interests of shippers as provided for by the Ghana Shippers' Authority Act, 1974 (N.R.C.D. 254).

## APPENDIX E

### Clause 54 of the Tourism Bill, 2010

#### **Sex tourism**

**54.** (1) Subject to the Criminal Offences Act, 1960 (Act 29) the practice of sex tourism whether as a supplier of tourism products and services or as a consumer or tourist is a criminal offence.

(2) A person who engages in sex tourism

(a) by living off a commercial sex worker's earnings;

(b) by corrupting a person for immoral purposes; or

(c) through a tourism enterprise which facilitates sex tourism especially with the involvement of a child

commits an offence and in addition to any penalty for a sexual offence under the Criminal Offences Act, 1960 (Act 29) is liable on summary conviction to a fine of not more than four hundred and fifty penalty units or to a term of imprisonment of not less than three years or not more than five years or to both.

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